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No. 98-1995

In the
Supreme Court of the United States
October Term, 1998

Graphic Communications International Union--Local 1B,

Petitioner,

vs.

Bureau of Engraving, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

Neither of the parties has a parent company nor non-wholly owned subsidiary.

QUESTIONS PRESENTED

1. Whether the Eighth Circuit decision reversing the District Court's Order and vacating two arbitration awards on the proper grounds that the awards failed to draw their essence from the collective bargaining agreement so far departs from the applicable standard of review as to call for an exercise of this Court's supervisory power.

2. Whether the Eighth Circuit decision reversing the District Court's Order and vacating two arbitration awards conflicts with the decision in *Aeronca, Inc. v. NLRB*, 650 F.2d 501 (4th Cir. 1981).

TABLE OF CONTENTS

Page

LIST OF PARTIES i

QUESTIONS PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 3

Preliminary Statement 3

DISCUSSION 3

I. This Case Does Not Meet The Standards For Supreme Court Review. 3

II. Petitioner Misconstrues The Eighth Circuit's Decision 5

A. The Eighth Circuit did not re-examine the facts or reach its own factual determinations. 5

B. The Ninth Circuit's decision in *Phoenix Newspapers* supports the Eighth Circuit's decision 6

C. The decision in *Aeronca* is inapplicable to this case. 7

III. The Eighth Circuit Properly Found That The Arbitrator's Decision Did Not Draw Its Essence From The CBA. 8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Aeronca, Inc. v. NLRB, 650 F.2d 501 (4th Cir. 1981) ..... ii, 3, 4, 7, 8

Alvey, Inc. v. Teamsters Local Union No. 688, 132 F.3d 1209 (8th Cir. 1997)..... 9, 10

Bruce Hardwood Floors v. UBC, S. Council of Indus. Workers, Local Union No. 2713, 103 F.3d 449 (5th Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 329 (1997) .. 4, 5

CSX Transp., Inc. v. United Transp. Union, 29 F.3d 931 (4th Cir. 1994) 8, 10

Desert Palace, Inc. v. Local Joint Executive Bd., 679 F.2d 789 (9th Cir. 1982)..... 6

Excel Corp. v. United Food and Commercial Workers, 102 F.3d 1464 (8th Cir. 1996)..... 9, 10

I.S. Joseph Co., Inc. v. Michigan Sugar Co., 803 F.2d 396 (8th Cir. 1986)..... 8

Keebler Co. v. Milk Drivers and Dairy Employees Union, Local No. 471, 80 F.3d 284 (8th Cir. 1996)..... 8, 9, 10

Loveless v. Eastern Air Lines, Inc., 681 F.2d 1272 (11th Cir. 1982) 8

Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union, 76 F.3d 606 (4th Cir.), *cert. denied*, 519 U.S. 822 (1996)..... 4, 5

Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752, 989 F.2d 1077 (9th Cir. 1993)..... 4, 6, 7

United Steelworkers v. Enterprise Wheel & Car Corp.,
363 U.S. 593 (1960) 9, 10

STATEMENT OF THE CASE

This case arises out of two grievances that were based on claims of missed overtime opportunities. The grievances were filed by Petitioner, Graphic Communications International Union--Local 1B, against Bureau of Engraving, Inc. ("Bureau"), which employs many of Petitioner's members. The primary issue raised by the grievances was the proper remedy under the parties' current collective bargaining agreement ("CBA") if an employee is passed over for overtime.

Under the current CBA (which became effective April 1, 1995, and runs until April 1, 2000), overtime at the Bureau is allocated on a straight rotation basis within each department. Prior CBAs called for yearly equalization of overtime between employees in a department.

The current CBA is silent as to any remedy that applies if a person is skipped in the overtime rotation. The parties have a historical past practice (as noted by the arbitrators) of remedying a missed overtime opportunity by awarding the person who was skipped the next available overtime within that person's department.

During negotiations for the current CBA (which took place in late 1994 and early 1995) both Petitioner and the Bureau recognized the need to change the manner in which overtime was allocated. The parties discussed using a straight rotation system of overtime allocation, which would replace the equalization system used previously. As part of those discussions over a new overtime allocation system, Petitioner proposed that the Bureau pay wages to employees who might be skipped in the overtime rotation. This became known as a "monetary remedy" for missed overtime opportunities. The Bureau expressly rejected this proposed remedy. Instead, the Bureau suggested that Petitioner take over all responsibility for implementing overtime policies at the Bureau, a suggestion Petitioner rejected. The Bureau also suggested

that neither it nor Petitioner be responsible for paying a monetary remedy if an employee is skipped in the overtime rotation. Petitioner, in essence, adopted this suggestion in all material respects.

The current CBA calls for arbitration of all grievances not otherwise settled by the parties. The grievances were arbitrated and decided in late 1996. Copies of the arbitrators' awards are found in Petitioner's Appendix.

The artibrators imposed upon the Bureau the obligation to pay money if an employee is skipped in the overtime rotation. In imposing this remedy, the arbitrators ignored the undisputed evidence that use of a monetary remedy had been rejected by both parties during contract negotiations for the current CBA. Instead, the arbitrators relied upon factors outside of the CBA, such as what other arbitrators have done "generally" in remedying missed overtime opportunities. (Appendix, at A33.)

The United States District Court for the District of Minnesota affirmed the arbitrators' awards, but failed to properly address the issue of whether the arbitrators had exceeded the scope of their authority in issuing their particular remedies. On appeal, the United States Court of Appeals for the Eighth Circuit reversed the district court's order and vacated the arbitration awards. The Eighth Circuit properly held that the arbitrators had exceeded their authority under the current CBA by adopting a remedy (*i.e.*, the monetary remedy) that the parties had expressly rejected during contract negotiations. The Eighth Circuit also denied Petitioner's petition for rehearing.

REASONS FOR DENYING THE PETITION

PRELIMINARY STATEMENT

This case does not meet the Supreme Court's standards for granting a petition for writ of certiorari. The Eighth Circuit followed established labor law in issuing its decision, which is consistent with decisions from other federal circuits on the issue of the deference to be given a labor arbitrator's award.

Contrary to Petitioner's claims, the Eighth Circuit did not exceed the proper scope of review when it determined that the arbitration awards should be vacated because they fail to draw their essence from the collective bargaining agreement. The Eighth Circuit did not re-examine the facts found by the arbitrators or reach its own factual determinations. Rather, the Eighth Circuit relied upon the same facts found by the arbitrators, most of which were undisputed.

Petitioner misconstrues the Fourth Circuit's opinion in *Aeronca, Inc. v. NLRB*, 650 F.2d 501 (4th Cir. 1981), which is not applicable to this case. In *Aeronca*, the Fourth Circuit refused to enforce an order of the National Labor Relations Board based upon a union's waiver of the duty to bargain. The *Aeronca* Court did not consider or decide whether an arbitrator's award failed to draw its essence from the parties' collective bargaining agreement. Petitioner also misconstrues the Eighth Circuit's holding in this case.

DISCUSSION

I. This Case Does Not Meet The Standards For Supreme Court Review.

The Eighth Circuit's decision does not meet this Court's standards for granting review. There is no inconsistency between the Eighth Circuit's decision and the decisions of

other circuit courts that requires the Court's intervention or clarification. In fact, the Eighth Circuit's decision is consistent with the decision of the Ninth Circuit Court of Appeals in *Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752*, 989 F.2d 1077 (9th Cir. 1993), as well as recent decisions of other circuit courts. *See, e.g., Bruce Hardwood Floors v. UBC, S. Council of Indus. Workers, Local Union No. 2713*, 103 F.3d 449 (5th Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 329 (1997); *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 76 F.3d 606 (4th Cir.), *cert. denied*, 519 U.S. 822 (1996). Petitioner's assertion that the Eighth Circuit's decision is in conflict with the Fourth Circuit's *Aeronca* decision is simply an erroneous interpretation of both *Aeronca* and the Eighth Circuit's holding, as is demonstrated below.

Nor did the Eighth Circuit depart from the accepted and usual course of judicial proceedings. Rather, it followed established precedent on the issue presented to it, the proper standard of review of a labor arbitrator's award.

Rule 10 of the Rules of the Supreme Court of the United States expressly states that petitions are "rarely granted" when the asserted errors are disputed factual findings or the application of a properly stated rule of law. This is precisely the assertion of error Petitioner is making here. Petitioner is simply wrong in its assertion of error regarding the Eighth Circuit's decision. Nonetheless, even if Petitioner's assertion of error was accurate, it is insufficient to justify a grant of this Court's supervisory powers under Rule 10. In essence, Petitioner presents no appropriate reason why this Court should exercise its supervisory powers.

The Court has recently denied petitions for writs of certiorari where the issue was whether the court of appeals had properly applied the standard of review to an arbitrator's award. *See, e.g., Bruce Hardwood Floors*, 103 F.3d 449, *cert. denied*, __ U.S. __, 118 S. Ct. 329 (1997); *Mountaineer Gas Co.*, 76 F.3d 606, *cert. denied*, 519 U.S. 822 (1996). The

present case is no different from *Bruce Hardwood Floors* or *Mountaineer Gas*. No basis exits for granting certiorari in this case.

II. Petitioner Misconstrues The Eighth Circuit's Decision.

A. The Eighth Circuit did not re-examine the facts or reach its own factual determinations.

In reviewing the district court's decision, the Eighth Circuit did not reexamine the merits of the underlying dispute, as Petitioner suggests. Instead, the Eighth Circuit accepted the factual findings made by the arbitrators. Based on those undisputed facts, the Eighth Circuit held that the arbitration awards did not draw their essence from the CBA and should be vacated. Contrary to Petitioner's argument, this holding relied upon the same facts found by the arbitrators.

That the Eighth Circuit did not re-examine the facts or make its own factual determinations is evident from the petition itself. Petitioner discusses three facts on which the Eighth Circuit relied to reach its conclusion that the awards did not draw their essence from the CBA. (*See* Petition, at 8-12.) These three facts, however, were found to exist by both arbitrators. They are not new facts or new factual determinations. Although Petitioner improperly disagrees with the legal conclusions the Eighth Circuit drew from these facts, the facts themselves are not new or even disputed. Moreover, the Eighth Circuit's legal conclusions are well within the bounds of its discretion when reviewing arbitration awards, as is demonstrated below.

B. The Ninth Circuit's decision in *Phoenix Newspapers* supports the Eighth Circuit's decision.

In a closely analogous case, the Ninth Circuit vacated an arbitrator's award as exceeding his authority because the parties' bargaining history indicated they did not agree and never would have agreed to the remedy imposed by the arbitrator. *Phoenix Newspapers*, 989 F.2d at 1082. The dispute in *Phoenix Newspapers* concerned unilateral manning changes by an employer, which the arbitrator remedied by forcing the employer to bargain with the union for a higher wage rate. Noting that the bargaining history of the parties indicated that the employer had vigorously fought the union's attempt to make the former manning practices binding and had rejected several proposals by the union to incorporate manning practices into the collective bargaining agreement, the court considered it "unlikely that the parties would have contemplated that manning changes should automatically be remedied by an increase in the . . . wage rate." *Id.* The court emphasized that the extent of an arbitrator's authority to fashion a remedy is limited to "decid[ing] what the parties would have agreed on had they foreseen the particular item in dispute." *Id.* at 1083 (quoting *Desert Palace, Inc. v. Local Joint Executive Bd.*, 679 F.2d 789, 793 (9th Cir. 1982)). Based on the evidence of the parties' intent from their prior bargaining history, the court held that "the arbitrator's remedy was not 'rationally derived' from the 'general framework or intent' of the Agreement." *Id.* (quoting *Desert Palace*, 679 F.2d at 793).

In this case, during contract negotiations over the current CBA, the Bureau rejected the Union's proposal to incorporate a monetary remedy for missed overtime opportunities into the CBA. Consistent with *Phoenix Newspapers*, the arbitrators' authority here was limited to "decid[ing] what the parties would have agreed on had they foreseen the particular item in

dispute." 989 F.2d at 1083. Here, the undisputed facts show that the parties did foresee that missed overtime opportunities would be the subject of grievances, and the Bureau refused to adopt a monetary remedy for such grievances. In *Phoenix Newspapers*, the court found it "unlikely," given the employer's opposition to making manning practices binding, that the parties would have reached an agreement to remedy manning changes with an increase in wages. *Id.* at 1082. In this case, the monetary remedy imposed by the arbitrators was discussed and explicitly rejected during contract negotiations. Faced with these facts, it is more than "unlikely" that the Bureau would have agreed to a monetary remedy. It is inconceivable. Accordingly, "[t]he arbitrator[s'] remedy was not based on a plausible interpretation of the Agreement, was not within the contemplation of the parties, and was not a fair resolution of the dispute." *Id.* at 1083.

C. The decision in *Aeronca* is inapplicable to this case.

Relying upon *Aeronca, Inc. v. NLRB*, 650 F.2d 501 (4th Cir. 1981), Petitioner asserts that the Eighth Circuit's decision is improper, claiming that it adopts a remedy that the Bureau had abandoned during negotiations, *i.e.*, make-up overtime. Petitioner misconstrues *Aeronca*, which has no applicability to this case.

Aeronca dealt with review of an order issued by the National Labor Relations Board, not an arbitrator's award. 650 F.2d at 501. Indeed, the Fourth Circuit determined that it need not decide whether the Board had abused its discretion in failing to give appropriate deference to the arbitrator's decision. *Id.* at 503. Rather, the Fourth Circuit concluded that the Board's decision was improper based upon labor law precedent having nothing to do with the deference that should be given to arbitrators' awards. *Id.* Petitioner misstates the

Fourth Circuit's holding, attempting to imply that the holding relates to review of a labor arbitrator's award. In fact, the Fourth Circuit denied enforcement of the Board's order because it found that the union had waived the company's duty to bargain over a particular issue. *Id.* at 501. *Aeronca*, therefore, is not applicable to this case, and the Eighth Circuit's decision is not in conflict with it.

Moreover, Petitioner misconstrues the scope of the Eighth Circuit's holding. Contrary to Petitioner's claim, the Eighth Circuit did nothing more than reverse the district court's order and vacate the arbitrator's awards. No specific remedy was imposed upon the parties by the court's holding. (*See* Appendix, at A7.) Thus, *Aeronca* has no application here, since the Eighth Circuit did not impose the remedy Petitioner suggests.

III. The Eighth Circuit Properly Found That The Arbitrator's Decision Did Not Draw Its Essence From The CBA.

While labor arbitration awards generally are subject to a deferential standard of review, an arbitrator's power to issue an award is confined by the intent of the parties. The Eighth Circuit correctly stated established law that "any power that the arbitrator has to resolve [a] dispute must find its source in a real agreement between the parties." *I.S. Joseph Co., Inc. v. Michigan Sugar Co.*, 803 F.2d 396, 399 (8th Cir. 1986). *See also CSX Transp., Inc. v. United Transp. Union*, 29 F.3d 931, 936 (4th Cir. 1994) (explaining that "[i]n construing any contract, including a collective bargaining agreement, determining the intent of the parties is the essential inquiry") (quoting *Loveless v. Eastern Air Lines, Inc.*, 681 F.2d 1272, 1279 (11th Cir. 1982)).

Accordingly, a reviewing court may vacate an arbitration award "when the award does not derive its essence from the collective bargaining agreement." *E.g., Keebler Co. v. Milk*

Drivers and Dairy Employees Union, Local No. 471, 80 F.3d 284, 287 (8th Cir. 1996). An arbitrator must construe the parties contract; the arbitrator cannot amend it or impose new obligations upon the parties. *Alvey, Inc. v. Teamsters Local Union No. 688*, 132 F.3d 1209, 1213 (8th Cir. 1997); *Excel Corp. v. United Food and Commercial Workers*, 102 F.3d 1464, 1467 (8th Cir. 1996); *Keebler Co.*, 80 F.3d at 288. When the arbitrator effectively amends the parties' contract, or imposes new and unbargained-for obligations on the parties, the award does not draw its essence from the collective bargaining agreement, and the arbitrator exceeds his or her authority. *Alvey*, 132 F.3d at 1213; *Excel Corp.*, 102 F.3d at 1467; *Keebler Co.*, 80 F.3d at 288.

As this Court explained in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), an arbitrator's award will not be enforced if it has no rational basis in the collective bargaining agreement:

> [An] arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from other sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

The one thing that may be said with absolute certainty about the proper remedy for missed overtime under the CBA is that the Union and the Bureau did not intend that remedy to be payment of wages. An arbitrator is confined to interpreting and applying the collective bargaining agreement (and the parties' intent thereunder). He is not free to amend the agreement or impose new obligations on the parties.

Enterprise Wheel & Car Corp., 363 U.S. at 597. *See Alvey*, 132 F.3d at 1213; *Excel Corp.*, 102 F.3d at 1468; *Keebler Co.*, 80 F.3d at 288. Determining the intent of the parties remains at all times "the essential inquiry." *See, e.g., CSX Transp., Inc.*, 29 F.3d at 936. Here, both arbitrators recognized the undisputed fact that the Bureau had explicitly rejected a proposal to include a monetary remedy for missed overtime opportunities in the CBA. Indeed, as Petitioner concedes, both parties to the negotiations rejected this as a viable remedy.

By ordering payment of wages for missed overtime opportunities, the arbitrators imposed the very remedy rejected by the parties during contract negotiations. The arbitrators effectively amended the parties' contract, forcing an obligation on the Bureau that it had refused to accept during negotiations. The arbitrators therefore exceeded their authority, and the awards were properly vacated by the Eighth Circuit. *See Alvey*, 132 F.3d at 1213; *Excel Corp.*, 102 F.3d at 1468; *Keebler Co.*, 80 F.3d at 288.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied. Respondent respectfully requests that the Court issue an Order denying the petition.

Dated: July 8, 1999.

Respectfully submitted,

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